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GERLING AMERICA INSURANCE COMPANY

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

MEMORANDUM OF POINTS AND AUTHORITIES**1. INTRODUCTION**

Fireman's Fund Insurance Company's ("FFIC") Opposition to Gerling America Insurance Company's ("Gerling") Motion for Summary Judgment completely ignores the undisputed facts supporting Gerling's motion, and mischaracterizes applicable law. FFIC has failed to put forward any evidence of any triable issue of fact to refute Gerling's showing that FFIC lacks standing to bring this action, or that the multiple exclusions in Gerling's policy preclude coverage for FFIC's claims. The Court should grant summary judgment in favor of Gerling.

2. ARGUMENT**A. FFIC Fails to Rebut Gerling's Argument That FFIC Has No Standing to Challenge Gerling's Coverage Decision**

FFIC does not, and cannot, deny that Gerling properly declined indemnity coverage for the underlying judgment in a letter to its insured, Gencor, on May 14, 2007. (Declaration of Thomas R. Beer ("Beer Decl."), Exhibit C.) The fact that Gerling waited until the trial was over has no bearing on whether FFIC, as a purported third-party claimant, has standing to challenge Defendant's coverage determination. Gerling properly reserved its rights while defending Gencor in the underlying action and properly declined indemnity coverage following trial.¹ Additionally, none of the cases cited by FFIC, *Seguros v. Maynard Bostrom*, 347 F.2d 168 (5th Cir. 1965), *Thompson v. Commercial Union Ins. Co.*, 250 So.2d 259 (Fla. 1971), *Progressive Express Ins. Co. v. Scoma*, 975 So.2d 461 (2007), and *Merchants & Businessmen's Mutual Ins. v. Bennis*, 636 So.2d 593 (1994), support the proposition that a third-party claimant without an assignment of rights under the policy can challenge the insurer's proper declination of coverage. FFIC plainly does not have standing and should not be permitted to proceed with this action.

B. FFIC Misapplies Florida Law on the "Contractual Liability" Exclusion

FFIC's argument against application of the "Contractual Liability" exclusion appears to be that the warranty provision in the written contract between Gencor and George Reed only covers

¹ In fact, the timing of Gerling's declination letter shows that Gerling acted properly in waiting for all evidence regarding the loss at issue to be presented at the underlying trial before making its final coverage determination. Significantly, Gencor never challenged Gerling's reservation of rights or

1 defects to the Plant, and that FFIC did not claim defects to the Plant in its action against Gencor.²
 2 FFIC cannot deny that it made numerous product defect allegations in its complaint against Gencor.
 3 FFIC fails to cite to any applicable case in support of its contention that its own allegations must be
 4 disregarded in the present coverage action. The undisputed fact is that FFIC made multiple
 5 allegations of product defects, which implicated the warranty provision in the contract. As Gencor
 6 expressly assumed liability for damages to the Plant under the warranty provision, the “Contractual
 7 Liability” exclusion applies and bars coverage for FFIC’s claims.

8 C. FFIC Fails to Rebut Application of the “Damage to Your Product” Exclusion

9 FFIC offers various arguments to undermine application of Gerling’s “Damage to Your
 10 Product” exclusion. None of those arguments has any factual or legal support. In particular, for the
 11 first time in this entire case, FFIC asserts that the Plant, which is comprised of various components,
 12 machinery and the like, was “real property.” FFIC fails to cite to any evidence whatsoever to
 13 support this allegation. As such, the argument is nothing more than impermissible speculation.
 14 Given FFIC’s complete failure to support this newly crafted argument with evidence, the Court
 15 should disregard it entirely. F.R.C.P 56(e)(2); *Brinson v. Linda Rose Joint Venture*, 53 F.3d 1044,
 16 1049 (9th Cir. 1995).

17 The “Damage to Your Product” exclusion precludes coverage for property damage to “your
 18 product” arising out of it or any part of it. FFIC cannot deny that the explosion of the Plant –
 19 Gencor’s product – was not caused by any outside source, but originated solely within the Plant
 20 itself. (Defendant Gerling America Insurance Company’s Request for Judicial Notice in Support of
 21 Motion for Summary Judgment (“RJN”), Ex. 7, Transcript of Proceedings, Vol. 7, 967:19-969:7.)
 22 The Plant’s destruction was caused by an explosion that started inside the Plant. Because the
 23 “Damage to Your Product” exclusion precludes coverage for damages that “arise out of [the

24 its subsequent declination of coverage.

25 ² FFIC’s contention that the judgment in its favor in the underlying Florida state court case was
 26 based solely on the actions of Calvin Dixon and not on any defect to the Plant has no support. In
 27 fact, the jury’s verdict form did not specify the basis or bases of the jury’s finding of breach of
 28 contract and negligence. The fact that the jury found that George Reed was partially liable for
 negligence and breach of contract suggests that the jury was unclear on the actual cause of the
 explosion, notwithstanding FFIC’s arguments to the contrary. RJN, Exhibit 6, Jury Verdict Form.
 Accordingly, it is possible that the judgment could have been based upon a finding of product defect

1 product] or any part of it," the exclusion applies by its plain terms to bar coverage for FFIC's
 2 claims.

3 The "Damage to Your Product" exclusion still applies under the holding in *Rad Source*
 4 *Tech., Inc. v. Colony National Ins. Co.*, 914 So.2d 1006 (2005). FFIC cannot deny that it made
 5 numerous, specific allegations in its underlying complaint against Gencor that the product at issue,
 6 the Plant, had multiple defects. FFIC's arguments to minimize the impact of its defect claims have
 7 no legal support. FFIC's only cited case, *Garcia v. Federal Ins. Co.*, 969 So.2d 288 (Fla. 2007),
 8 does not support the contention that the allegations contained in a party's complaint must be ignored
 9 in a subsequent coverage action. In fact, *Garcia* appears to be completely silent on this issue.

10 FFIC also argues that the "Damage to Your Product" exclusion should not apply because the
 11 Plant was no longer Gencor's "product" following its assembly by George Reed. FFIC relies on
 12 *Broward Marine, Inc. v. Aetna Ins. Co.*, 450 So.2d 330 (1984) for support. *Broward Marine*
 13 addressed the issue of whether an item remains a "product" for coverage purposes "no matter how
 14 much time passes after the buyer takes possession" and after "corrective work" has been performed
 15 on it. *Broward Marine*, 450 So.2d at 331. In the present case, the time between the manufacture
 16 and delivery of the Plant and its explosion was a few months. Moreover, no "corrective" work was
 17 performed on the Plant. It is undisputed that George Reed assembled the Plant pursuant to Gencor's
 18 instructions over the course of three months, and that Calvin Dixon was performing contractually
 19 mandated start-up and calibration services, not remedial or corrective work, shortly after Reed
 20 completed the assembly. (RJN, Ex. 2, 182:21-183:2.) FFIC does not claim any material change to
 21 the Plant following its manufacture by Gencor. *Broward Marine* is plainly distinguishable. The
 22 Plant was still Gencor's "product" at the time of its explosion. All factual and legal requirements
 23 for the application of the "Damage to Your Product" exclusion are satisfied. Gerling's motion for
 24 summary judgment should be granted.

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 27
 28 in the Plant.

1 **D. FFIC Acknowledges That the “Damage to Your Work” Exclusion Plainly**
 2 **Applies in This Action**

3 FFIC acknowledges that Gerling’s “Damage to Your Work” exclusion has been satisfied by
 4 the facts in the underlying case, as it is undisputed that Calvin Dixon was performing “an operation”
 5 at the time of the explosion. (FFIC’s Opposition Brief, p.12:7-8.) FFIC disputes only the extent to
 6 which this exclusion precludes FFIC’s claim for damages. FFIC argues that the exclusion precludes
 7 coverage only for a minuscule part of its overall claims because the only “work” Calvin Dixon was
 8 performing at the time of the explosion was to the Plant’s temperature control system. FFIC again
 9 relies on *Broward Marine*, 459 So.2d at 330, for support. *Broward Marine* does not address, or
 10 even mention, the “Damage to Your Work” exclusion, and lends no support to FFIC’s extreme
 11 interpretation and artificial limitation of that exclusion. Furthermore, FFIC’s argument deliberately
 12 ignores the full extent of Gencor’s “work” on the Plant.

13 The written contract between Gencor and George Reed necessarily defines the scope of
 14 Gencor’s “work,” particularly since all of FFIC’s alleged damages arise out of its claim for breach
 15 of that very contract by Gencor. It is undisputed that Gencor had the contractual obligation to
 16 manufacture the Plant and deliver it to George Reed.³ Following delivery, Gencor had the
 17 obligation to provide “field engineering services” for the entire Plant, which included initial
 18 calibration, start-up operation and clean up of the Plant’s system by Calvin Dixon. (Beer Decl.,
 19 Exhibit A.) While FFIC attempts to ignore or mischaracterize the full extent of
 20 Mr. Dixon’s/Gencor’s “work,” the undisputed fact remains that Mr. Dixon was performing a part of
 21 Gencor’s overall “work” on the Plant at the time of the explosion. *Id.* It is also undisputed that
 22 Mr. Dixon was performing services to the Plant to fulfill Gencor’s contractual obligations. (RJN,
 23 Ex. 2, Transcript of Proceedings, Vol. 2, 183:3-215:20.) Accordingly, because Gencor’s “work” is
 24 the Plant, including the operations performed by Mr. Dixon at the time of the explosion, the
 25 “Damage to Your Work” exclusion precludes coverage for all of FFIC’s claimed damages.

26 ³ FFIC’s contention that “because Gencor did not construct the plant, the plant was not Gencor’s
 27 “work” has no factual or legal support. Gencor manufactured the Plant and delivered it to George
 28 Reed. George Reed merely assembled the Plant pursuant to instructions provided to it by Gencor.
 This assembly did not materially change the Plant, and therefore, the Plant does remain Gencor’s
 “work.”

1 **E. Calvin Dixon's Work Constituted "Professional Services" and the "Professional**
 2 **Liability" Exclusion Applies**

3 FFIC contends that Calvin Dixon's work on the Plant does not qualify as "professional
 4 services" because Mr. Dixon merely worked on the electronic system of the Plant instead of
 5 "conceptually design[ing] a component part included within the plant." (FFIC's Opposition Brief,
 6 p. 13:23-24.) FFIC completely fails to support its assertion that services must involve "conceptual
 7 design" to qualify as "professional services" under Florida law. In fact, one of the cases on which
 8 FFIC relies, *Aerothrust Corp. v. Granada Ins. Co.*, 904 So.2d 470, 472 (2005), holds that "only
 9 those [] services which require specialized training should be considered professional services." It
 10 is undisputed that Mr. Dixon was a highly experienced technician and had received substantial,
 11 specialized training on Gencor's asphalt plants.

12 As with its arguments on the "Damage to Your Work" exclusion, FFIC attempts to
 13 artificially narrow the work that Mr. Dixon was performing on the Plant. FFIC's contention that
 14 Mr. Dixon's work consisted of "disconnecting the electronic wiring" ignores the full extent of the
 15 field engineering services he actually performed to the Plant prior to the explosion and which were
 16 called for by the Reed/Gencor contract. (RJN, Ex. 2, 183:3-215:20.) Additionally, FFIC cannot
 17 claim that Mr. Dixon lacked "specialized training" in his services as a Gencor field service
 18 technician. (RJN, Exhibit 2, 166:15-169:25; 188:18-189:4 (discussing Mr. Dixon's training and
 19 extensive work experience in servicing asphalt plants).) Accordingly, Mr. Dixon's work on the
 20 Plant clearly qualifies as "professional services" and the "Professional Liability" exclusion applies
 21 to preclude coverage for FFIC's claims.

1 **3. CONCLUSION**

2 For the foregoing reasons, the Court should grant Gerling's motion for summary judgment.

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4 Dated: July 25, 2008

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